No. 89-544 (2)

— IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PASQUALE J. CURCIO, JOHN ANDREW KAY and DAVID J. WILMOTT, as individuals and residents of the County of Suffolk,

Petitioners,

vs.

E. THOMAS BOYLE, County Attorney of the County of Suffolk, ELIZABETH TAIBBI, Clerk of the Suffolk County Legislature, and GEORGE WOLF, as a Commissioner of the Suffolk County Board of Elections,

Respondents,

HAROLD J. WITHERS, as a Commissioner of the Suffolk County Board of Elections,

Non-Appearing Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an initiative to place on the November 1989 ballot a referendum to replace the county legislature with a board of supervisors that would vote according to a modified weighted voting plan, was properly rejected by the County Attorney pursuant to local statute where:

1) the proponents of the initiative failed to meet their burden of proof by not coming forward with any mathematical analysis of the proposed specific weighted voting plan, thereby precluding any reasoned judgment whether the proposal would comply with established "one person one vote" principles; and

2) the proposal itself failed to advise the voters adequately of the actual mechanics of the plan, or how their representation would differ from the current legislative scheme.

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TABLE OF CASES

Statutes:

Respondents, E. Thomas Boyle, County Attorney of the County of Suffolk, and Elizabeth Taibbi, Clerk of the Suffolk County Legislature, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the judgment of the New York State Court of Appeals, which dismissed this case for want of a substantial constitutional question. That opinion is reported at 74 N.Y.2d 733, 544 N.Y.S. 2d 818, ____N.E.2d____(1989).

STATEMENT OF THE CASE

This case emanates from the rejection by the Suffolk County Attorney of Petitioner's proposed referendum to abolish the existing county legislature and to replace it with a weighted vote board of supervisors. The County Legislature is composed of eighteen, single member districts of approximately equal size. Each legislator casts one vote. However, pursuant to the proposed referendum,

there would only be ten members of the board of supervisors: one supervisor from each town in the county. The respective populations of the towns vary greatly. The votes of the members of the board of supervisors would be allocated by means of a weighted voting system commonly known as the Banzhaf voting power index. The text of the referendum however, failed to apprise the voters of how many votes each of the supervisors would cast, and failed to provide a mechanism for the voters to ascertain how their representation would differ from the current legislative scheme. The County Attorney rejected the petition as a matter of law, pursuant to the terms of the Suffolk County Code (*Suffolk County Charter* Article 7, and *Suffolk County Administrative Code* Article 7) on the ground that it was based on the Banzhaf voting power standard found invalid in *Board of Estimate v. Morris*, _____U.S._____, 109 S.Ct. 1433 (1989), and on the further ground that the

petition did not contain sufficient information to enable the voters to make a knowledgeable choice on the issue.(R[1] 168)

A. The Proposed Charter Amendment

The full text of section C2-3 of the proposal, which pertains to voting by the Board of Supervisors, is contained in appendix "A" annexed hereto. In pertinent part, the proposal provides that:

> [t]here shall be a modified weighted voting system based upon the then current law on modified weighted voting systems, including the modified weighted voting standards enunciated and approved by the court of Appeals in **Iannucci v. Board of Supervisors**, 20 N.Y.2d 244, 282 N.Y.S.2d 502, 299 N.E.2d 195 and in **Franklin v. Krause**, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68, appeal dismissed, 415 U.S. 904, 39 L.Ed.2d 461, 94 S.Ct.

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1 - References preceded by "R" are to the record on appeal to the New York State Supreme Court, Appellate Division, Second Department.

> 1937...the voting power of a supervisor shall be measured by the mathematical possibility of his casting a decisive vote on a particular matter consistent with the standards enunciated in the Iannucci and **Franklin** cases, supra.

[bold emphasis in the original] (R 159) The foregoing standards for determining a voting structure, established in both the *Franklin* and *Iannucci* cases, are commonly known as the Banzhaf Power Weighted Voting Index.

B. The County Attorney's Determination that the Proposal is Illegal

By letter dated March 28, 1989, the County Attorney determined that the proposal was illegal. Contrary to Petitioners' statement, the County Attorney did not interpret this Court's decision in *Board of Estimate v. Morris, supra,* as rendering any weighted voting scheme unconstitutional (Pet. 7). Rather, the County Attorney noted that the Court had held the Banzhaf Weighted Voting Power Index to be unconstitutional, and since the

proposed charter amendment in issue was based upon that unconstitutional scheme, it, too, was illegal. (R 165-167)

Furthermore, the County Attorney held that the proposal was too vague and indefinite and would therefore deprive the voters of the ability to make a knowing and intelligent choice concerning this referendum.

C. Petitioner's Action

After the County Attorney had rejected the proposed charter amendment, Petitioners commenced a special proceeding in the Supreme Court of the State of New York, pursuant to Article 78 of the state's Civil Practice Law and Rules. Petitioners sought, *inter alia*, to have the County Attorney's determination annulled and to have the proposed charter amendment declared legal. (R 136)

While the state supreme court granted Petitioners the relief which they had

sought, the Appellate Division unanimously reversed that judgment and dismissed the proceeding on the merits.

The Appellate Division never reached a federal constitutional question. Indeed, it did not even cite the matter of *Board of Estimate v. Morris, supra,* in its opinion. Rather, the court found that the Petitioners, as proponents of a weighted voting plan, had failed to meet their burden of proof as required by state law. Since Petitioners had not submitted any mathematical analyses of the proposed weighted voting plan, the court could not reach a considered judgment that the proposed plan would comply with established "one person one vote" principles. (Pet. App. 3) Furthermore, the court found that the proposal was properly rejected on the ground of vagueness since the voters would not have any way of ascertaining from the text of the proposal either how their representation

would be affected, the aggregate number of votes to be allocated among the supervisors, or the number of votes which each of their supervisors would cast. (Pet. App. 4-5)

The Appellate Division expressly noted that its decision in this proceeding was not inconsistent with its prior determination in the *Matter of Leirer v. Ashare*, 132 A.D.2d 700, 518 N.Y.S.2d 180 (2d Dep't 1987), since the challenges to the proposal that were raised in this proceeding were neither raised nor contemplated in Leirer. (Pet. App. 5)

Petitioners then applied for leave to appeal to the highest court in New York State. The Court of Appeals dismissed the appeal on its own motion based upon its finding that no substantial constitutional question is directly involved. (Pet. App. 1)

REASONS FOR DENYING THE WRIT

1. The Decision Below Was Based On Issues Of State Law.

The Appellate Division upheld the County Attorney's rejection of the proposed charter amendment on the grounds that it was too vague, and the Petitioners had failed to meet their burden of proof. The holding of the court is based solely on state law. Thus, there is no basis for federal review. *Atkins v. Louisiana*, 441 U.S. 927, 98 S.Ct. 2041, 60 L.Ed.2d 402 (1979), and *Illinois v. Pendleton*, 435 U.S. 956, 98 S.Ct. 1590, 55 L.Ed.2d 809 (1978).

In support of its holding with regard to the vagueness of the proposed referendum, the Appellate Division relied exclusively upon the *Application of Grenfell*, 269 A.D. 600, 58 N.Y.S.2d 501 (3d Dep't 1945), aff'd, 294 N.Y. 610 (1945). In that case, the petitioner sought to amend the city charter to abolish its system of government and to return to its former mode of government

under the Second Class Cities Law. The court held that mere blanket references to the Second Class Cities Law rendered the proposal illegal and insufficient because the voters are entitled to know from the language of the proposal itself precisely what they are called to pass upon. *Id.* 58 N.Y.S. 2d at 504. Similarly, in this case the Appellate Division held that:

> [t]he instant proposal, with its blanket references ... to 'the modified weighted voting standards enunciated and approved by the Court of Appeals in Iannucci v. Board of Supervisors, 20 NY2d 244 * * * and in Franklin v. Krause, 32 NY2d 234' does not adequately apprise the voters from any of the towns within Suffolk County of precisely how many votes each of their respective Supervisors would cast. Thus, the voters would have no way of knowing how their representation would vary from the present legislative scheme, or from that of their county neighbors under the proposed weighted voting plan...Thus, the paucity of information in the petitioners' proposal requires its rejection.

With regard to its finding that the Petitioners had failed to meet their burden of proof, the Appellate Division relied upon *Iannucci v. Board of Supervisors, supra,* 20 N.Y.2d 244 (1967); *English v. Lefever,* 94 A.D.2d 755 (2d Dep't 1983); and *Van Nostrand v. Board of Supervisors of County of Seneca,* 67 Misc. 2d 1096 (1971). These cases hold, as a matter of state law, that it is incumbent upon the proponents of a weighted voting plan to prove its constitutional compliance[2]. *Reynolds v. Sims,* 377 U.S. 533, *rearg denied* 379 U.S. 870 (1964), cited by Petitioners, did not address the issue

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[2]The question posed by Petitioners for review by the Court is inconsistent with their previously stated position. The proposal specifically adopts the modified weighted voting standard set forth in *Ianucci v. Board of Supervisors* (the Banzhaf Voting Power Index). Thus, the mathematical analysis is an essential ingredient of the very case on which petitioners expressly rely in the text of the proposal.

of burden of proof and therefore is not inconsistent with the holding below.

2. The Court's Recent Decision in *Board of Estimate v. Morris* is Controlling

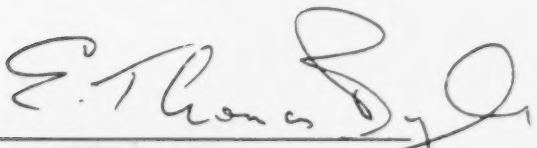
The Banzhaf Voting Power Index, upon which Petitioner's proposal is founded, and which calculates a citizen's voting power by the mathematical possibility of each representative to affect the vote of the legislative body, was recently rejected by the Court in *Board of Estimate v. Morris, supra.* The Court found that the Banzhaf methodology was theoretical and unrealistic in that it does not account for "political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." *Id.* at 1440. The Court expressly reaffirmed the population-based approach

of *Reynolds v. Sims, supra,* and its progeny, to wit: "that seats in legislative bodies be apportioned to districts of substantially equal populations." Petitioners provide no reason for this court to re- examine the principles established in *Board of Estimate v. Morris, supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Dated: Hauppauge, New York
October 31, 1989

APPENDIX

Section C2-2. General Powers of the Board of Supervisors

The Board of Supervisors shall exercise the county's powers is local legislation and appropriation in accordance with the provisions of this Charter.

Section C2-3. Voting

a) A majority of the whole number of votes of the members of the board shall constitute a quorum. Except as otherwise provided herein, local laws and resolutions shall be adopted by a vote of not less than a majority of the total voting strength of the Board of Supervisors. Whenever any law or resolution shall require an affirmative ~~a~~action by a majority or extraordinary majority of the legislative body, such requirements shall be deemed and construed to mean a majority or extraordinary

majority of the voting power of the Board of Supervisors as provided by this section. The requirement of a majority shall mean the majority of the voting power of the Board of Supervisors. The requirement of a two-thirds (2/3) affirmative vote shall mean two-thirds (2/3) of the voting power of the Board of Supervisors. The requirement of a three-fourths (3/4) affirmative vote shall mean three-fourths (3/4) of the voting power of the Board of Supervisors. An abstention shall not be counted as a vote.

b) The supervisors of each town shall be entitled to cast at meetings of the Board of Supervisors the number of votes to be determined and fixed in accordance with the provisions of this section.

c) In accordance with the standards set forth in subdivision (d) of this section, the Board of Supervisors shall not later

than sixty days after the publication of the results of each federal decennial census, or any county-wide special population census, reapportion the voting power of the members of the Board of Supervisors. However, after the reapportionment of voting power based on the 1990 federal census, reapportionment shall not be made more than once in any five year period.

d) In determining and fixing the total number of votes, the distribution of votes among the Supervisors, and the number needed to pass particular measures, the Board of Supervisors shall conform to the following standards:

(i) There shall be a modified weighted voting system based upon the then current law on modified weighted voting systems, including the modified weighted voting standards enunciated and approved by the

Court of Appeals in **Ianucci v., Board of Supervisors**, 20 N.Y.2d 244, 282 N.Y.S.2d 502, 229 N.E.2d 195 and in **Franklin v. Krause**, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68, appeal dismissed 415 U.S. 904, 39 LEd 2d 461, 94 S.Ct. 1397.

(ii) The total number of votes of all supervisors shall be no less than 10 and shall not exceed the County's total population.

(iii) No fractional votes shall be used or recognized.

(iv) The total number of votes which each supervisor is entitled to cast shall not be divided and shall be cast as one unit.

(v) The voting power of a supervisor shall be measured by the mathematical possibility of his casting a decisive vote on a particular matter consistent with the

standards enunciated in the **Ianucci** and **Franklin** cases, **supra**.

(vi) The percentage of voting power of each town shall be greater than zero and shall approximate that town's percentage of the total county population.

(vii) In preparing each reapportionment, the Board of Supervisors shall employ an independent computerized mathematical analysis, and such other method or methods, as shall most nearly equalize the percentage of voting power of each town to its percentage of the total county population consistent with the standards enunciated in the **Ianucci** and **Franklin** cases, **supra**.

e) If this Charter Law is approved by the voters as provided in Section 3, **infra**, at the next general election to be held not less than ninety (90) days following the date upon which this Charter

Law shall qualify for submission to the electorate in the form of a referendum, then:

(i) The Board of Supervisors in determining the number of votes that shall be assigned to each supervisor shall employ an independent computerized mathematical analysis and such other method or methods as shall most nearly equalize the percentage of voting power of each town to its percentage of the total county population. Such analysis shall be done so that the votes assigned to each supervisor will be in conformity with the current law including the rules enunciated in the **Franklin** and **Ianucci** cases cited in subdivision (d)(i), **supra**.

(ii) In determining the number of votes assigned to each supervisor, the most current decennial federal census figures shall be used, or, if any more current

county-wide special population census figures are available, those figures will be utilized.